

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DUSTIN FOCKLER,)	
)	
Plaintiff,)	Civil Action No. 05-123 ERIE
)	Judge Sean J. McLaughlin
v.)	Magistrate Judge Baxter
)	
UNITED STATES)	Electronically Filed
MARSHALS SERVICE,)	
)	
Defendant.)	

**DEFENDANT’S MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION**

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, defendant the United States Marshals Service respectfully moves the Court for an Order dismissing plaintiff Dustin Fockler’s Complaint in this action, and in support thereof states as follows:

1. Plaintiff Dustin Fockler filed this *pro se* action against the United States Marshals Service (“USMS”) under the provisions of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq.* Plaintiff’s claims arise out of two (2) separate incidents that occurred while he was in the custody of defendant USMS en route to his current place of incarceration at a federal prison in McKean County, Pennsylvania (“FCI McKean”).

2. Specifically, the Complaint alleges that, during plaintiff’s transports on aircraft leased by defendant, the aircraft experienced severe mechanical malfunctions causing them to make emergency landings. Plaintiff alleges that defendant is negligent for failing to maintain the leased aircraft. As a result of defendant’s alleged negligence, plaintiff claims that he suffers from Post Traumatic Stress Disorder (“PTSD”). He seeks \$2 million in damages.

3. The Court, however, should dismiss plaintiff's Complaint in its entirety for the following reasons: (i) all claims against the USMS should be dismissed because the United States is the only proper defendant in an FTCA claim; (ii) even assuming that plaintiff had named the proper party, his claims still fail because he admits that the aircraft at issue were leased by the government, and the FTCA does not waive sovereign immunity for acts of independent contractors; and (iii) plaintiff cannot recover damages for PTSD because the FTCA explicitly requires incarcerated felons to show physical injury. Accordingly, the Court should grant defendant's motion to dismiss for lack of subject matter jurisdiction.

4. A Brief in Support of this motion, together with an attached Declaration of Jessica Born and accompanying Exhibits, are being filed simultaneously herewith and the contents therein are incorporated by reference.

WHEREFORE, for all the foregoing reasons, as explained more fully in the accompanying Brief, defendant respectfully requests that the Court issue an Order granting its Motion to Dismiss for Lack of Subject Matter Jurisdiction.

A proposed order is attached.

Respectfully submitted,

MARY BETH BUCHANAN
United States Attorney

/s/ Megan E. Farrell

MEGAN E. FARRELL
Assistant U.S. Attorney
Western District of PA
U.S. Post Office & Courthouse
700 Grant Street, Suite 4000
Pittsburgh, PA 15219
(412) 894-7429
PA ID No. 76972

Counsel for defendant United States Marshals
Service

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